

STATE OF MICHIGAN
COURT OF APPEALS

In re A. R. JENKINS, Minor.

UNPUBLISHED
July 19, 2016

No. 330209
Benzie Circuit Court
Family Division
LC No. 14-001911-NA

Before: MURRAY, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Respondent father appeals as of right the trial court’s order terminating his parental rights to his minor child. We reverse and remand.

In December 2014, the child was removed from her mother’s custody and placed in foster care. Respondent subsequently signed an affidavit of parentage to establish his paternity of the child. In an amended petition, petitioner sought termination of respondent’s parental rights at the initial dispositional hearing. The petition alleged that respondent’s parental rights to two other children had previously been terminated after the initiation of child protective proceedings, and requested termination of respondent’s parental rights to the instant child pursuant to MCL 712A.19b(3)(l). Following a hearing, the trial court terminated respondent’s parental rights, stating as follows:

But—the—bottom line is, this case isn’t about [respondent]. This case is about [the child].

I’m in the position . . . I have to take [the child’s] age into account. If this was an older child, the Court could easily drag this out for six months, nine months, a year, whatever. An older child is still going to have attachment to his or her original parent. [The child] has never known this man as her father. She just hasn’t.

The first three months of her life she was with [the mother]. She will never remember those three months. Seventy-seven percent of her life, seventy-seven percent, has been with this foster family.

I mean, the—clear and convincing evidence . . . I was one that said, “I’m going to give him the opportunity for parenting time. I’m going to be the one to give him the opportunity for services.” Because I, in part, I wanted to try getting

you focused on what you need to do to change your life. But if I wouldn't have done that, since you had—your parental rights have been terminated not once but twice previously, I realistically wouldn't even have had to offer that up. Your past is . . . the clear and convincing evidence is that your past is what is hurting you today. It just is.

I'm not saying you're a bad guy. But there's just no way I can say that . . . well, let me rephrase it this way. I mean the clear and convincing evidence is M.C.L. 712.(A). Say's "Parental right can be terminated because of neglect, depravity, drunkenness . . ." Well under drunkenness, your drug addiction has caused you problems over the years. For a long time. Which in turn, has cause—put you in a financial situation where . . . let's say I sent [the child] home with you today. We're going to be back here in a month on a new petition for depravity because it just doesn't appear that you have the financial [wherewithal] to be able to take care of this child. And again, you're trying to change your life. And don't think no—nobody in here does not see that or appreciate it. But your past drug use, the exact same reasons that caused you to lose your parental rights twice before, have put you in this position.

If I am to look at [the child] and her best interest only, I have to terminate parental rights. And the Court will enter an order terminating respondent's parental rights.

The trial court thereafter issued a dispositional order terminating respondent's parental rights, which provides, in pertinent part:

There is clear and convincing evidence that a statutory basis exists for terminating the parental rights of [respondent] to [the minor child], through testimony and statements placed on the record regarding [respondent]'s drug dependency issues, termination of parental rights to two previous children (MCL 712A), and his inability to take care of himself.

Respondent first argues that the trial court erred by failing to state the statutory basis for its decision. MCR 3.977(I)(3) provides that "[a]n order terminating parental rights . . . may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order." The court may state its findings of fact and conclusions of law "on the record or in writing." MCR 3.977(I)(1); see also MCL 712A.19b(1) ("[t]he court shall state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be terminated"). "Brief, definite, and pertinent findings and conclusions on contested matters are sufficient." MCR 3.977(I)(1).

The trial court's decision on the record and its written order both purport to cite a statutory basis for the court's decision to terminate respondent's parental rights. However, neither source cites a valid basis for termination. The trial court's oral decision and written order both cite "MCL 712A" as the statutory basis for its decision. That citation is incomplete. It refers generally to chapter 12A of the Juvenile Code, MCL 712A.1 *et seq.*, without identifying any specific statute within that chapter that serves to support the court's decision to terminate

respondent's parental rights. Moreover, we agree with respondent that a valid basis for termination cannot be gleaned from the trial court's findings of fact or conclusions of law recited on the record or in its written order.

In its oral decision, the trial court cited "MCL 712.(A)" and then stated that "[p]arental right can be terminated because of *neglect, depravity, drunkenness . . .*" (Emphasis added.) It appears from the emphasized language that the trial court was referring to MCL 712A.2(b)(2), which authorizes a court to exercise jurisdiction over a child under 18 years of age "[w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in." Although these circumstances allow a court to exercise jurisdiction over a child, they do not support termination of parental rights. Grounds for terminating parental rights are set forth in MCL 712A.19b(3). The petitioner has the burden of proving at least one statutory ground for termination in MCL 712A.19b(3) by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 356; 612 NW2d 407 (2000). The "neglect, depravity, drunkenness" language recited by the trial court in support of its termination decision does not appear in any of the statutory grounds for termination set forth in MCL 712A.19b(3). Thus, the trial court erred to the extent it relied on the conditions set forth in MCL 712A.2(b)(2) in support for its decision to terminate respondent's parental rights.

In its decision on the record, the trial court also stated, "[T]he bottom line is, this case isn't about [respondent,] [t]his case is about [the child]" and "[i]f I am to look at [the child] and her best interest only, I have to terminate parental rights." To terminate parental rights, the trial court was required to find both that a ground for termination under MCL 712A.19b(3) had been established by clear and convincing evidence, and that termination of parental rights was in the child's best interests. MCL 712A.19b(3) and (5); MCR 3.977(E)(3)(b) and (4). Thus, the trial court also erred to the extent it believed it could terminate respondent's parental rights based solely on the child's best interests, without separately finding a valid statutory ground for termination.

Respondent also asserts, and we agree, that MCL 712A.19b(3)(l), the only statutory ground cited in the amended petition, is not a valid basis for upholding the trial court's decision. MCL 712A.19b(3)(l) authorizes termination of parental rights where "[t]he parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state." Although petitioner presented evidence in support of this statutory ground, the trial court did not cite it as a statutory basis for its decision. Moreover, this Court has recently held that § 19b(3)(l) is unconstitutional because it creates a presumption of parental unfitness without providing a fair opportunity to rebut it, in violation of the Due Process Clause of the Fourteenth Amendment. *In re D Gach*, ___ Mich App ___; ___ NW2d ___ (Docket No. 328714, issued April 19, 2016); slip op at 7-8. Accordingly, § 19b(3)(l) is not a proper basis for upholding the trial court's decision to terminate respondent's parental rights.

Petitioner argues that other statutory grounds, specifically MCL 712A.19b(3)(g) and (j), while not cited in the petition or found by the trial court, may be used to support the trial court's decision. Those subsections allow a court to terminate parental rights under the following circumstances:

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Some of the trial court's findings arguably apply to §§ 19b(3)(g) and (j). However, these subsections were not cited in the petition seeking termination, or in either the trial court's decision from the bench or order terminating parental rights. Because this Court's review is not de novo, see *In re Rood*, 483 Mich 73, 90; 763 NW2d 587 (2009), and *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011), it would be inappropriate for this Court to simply review all of the evidence and determine whether clear and convincing evidence existed to warrant termination of respondent's parental rights under these unpleaded subsections. Accordingly, we decline to consider §§ 19b(3)(g) and (j).

In sum, the trial court failed to state a valid statutory basis for termination, and it erred in its analysis to the extent it believed that respondent's parental rights could be terminated either because of clear and convincing evidence establishing grounds for termination under MCL 712A.2(b)(2), or based solely on the child's best interests. In addition, MCL 712A.19b(3)(l), the only statutory ground cited in the amended petition, has been held to be unconstitutional, and we decline to consider other statutory grounds for termination that were not cited in the petition or found by the trial court. Accordingly, we reverse the trial court's order terminating respondent's parental rights and remand for further proceedings. Given our resolution of respondent's other issues, we decline to address his assertion that he was denied the effective assistance of counsel below.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Patrick M. Meter